The Senate In A Federal System

The Position Of
The Province of Prince Edward Island

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FOREWORD

One of the main concerns today in Prince Edward Island is what Confederation of the future holds for us as the smallest member, and for Canada as a nation. In human terms, we have grown with this nation for over one hundred years, observing its development and enjoying the personal riches it has provided.

We have also observed far-reaching social, economic and institutional changes. These changes have led many to assess the effectiveness of our federalism. We believe that many of our institutions and structures need rethinking, if our country is to move forward into the 21st century with the same vigour as it has in the past.

This paper discusses one of the most significant institutions in our system. It is our opinion that the Senate needs changes that will assist Canada with the pursuit of classic federalism - a federalism which will allow all partners to maximize their contribution to this great country.

James M. Lee, P.C.
Premier of Prince Edward Island

5 December, 1983

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I Background

A. The Constitution and Senate Reform

After participating in the first stage of negotiations leading to a constitutional settlement in 1982, the Province of Prince Edward Island is pleased to issue this paper on a subject which is next on the agenda for constitutional renewal in Canada. We refer of course to the idea of reforming the Canadian Senate so that it might more effectively serve the interests of all Canadians.

Rewriting constitutions is never an easy or even a popular exercise. It may strike many of our citizens as a nuisance when there are so many other pressing problems which governments have to tackle — problems like finding jobs for our people or improving government services. But the Government of Prince Edward Island believes that in this case, the issue raises a serious matter for all Islanders.

The reason is that the usefulness of all of the federal legislation passed affecting our province may ultimately depend on how well we can make the Senate of Canada work in our favour. One of the major reasons for having a Senate at all was to help smaller provinces like Prince Edward Island to have a stronger voice in Ottawa than would be possible by their meagre representation in the Cabinet or the House of Commons. The Senate has unfortunately not turned out to be much of a champion of the interests of smaller provinces like ours. We now have an opportunity to try to correct this failure and to create a new Senate which is more up to date and responsive to our needs.

This can be done by rewriting the fundamental law of the country so that the legal basis for the existing Senate is changed. By agreement between the Parliament of Canada and the legislatures of at least seven provinces, Canadians can try again by creating a new Senate which will serve Canadians better than its predecessor. This paper is a contribution to the public debate which will be necessary before any formal changes to the Senate are discussed by the governments. It also formally sets out the Province's position first officially stated in the Constitutional negotiations of 1980.

Reform of the Canadian Senate has been discussed since its inception in 1867. Individuals, groups, historians, politicians, and governments have debated its reason for existence and its usefulness. Various reports have been commissioned by governments and associations on its reformation. Both the debates and reports, while few at first, have multiplied in recent years. This fact, combined with continuing intergovernmental discussions on the need for constitutional changes respecting the Senate, has prompted much public interest in Senate reform.

B. Special Joint Committee of Senate and House of Commons (1982)

The Special Joint Committee of the Senate and the House of Commons was established in December of 1982 to study reform of the Senate. The terms of reference for the Committee are "to consider and report on ways by which the Senate of Canada could be reformed in order to strengthen its role in representing people from all regions of Canada and to enhance the authority of Parliament to speak and act on behalf of Canadians in all parts of the country."

The mandate of the Joint Committee is challenging and the purpose sincere. However, comprised only of representatives from the Senate and House of Commons, the Committee does not and cannot properly reflect or represent the views of the Provinces of Canada, even though the Provinces are partners in the Canadian parliamentary federation.

The Senate, moreover, cannot be reformed without the consent of at least a substantial number of the provinces. That was clear in 1980 when the Supreme Court ruled that Parliament alone could not proceed to change the Senate of Canada (as it had been seeking to do since 1978) without provincial agreement. This court decision has been confirmed by the *Constitution Act, 1982;* major changes in this area will now require the support of seven provincial legislatures and the Parliament of Canada. At this stage of the process, the Government of Prince Edward Island has accordingly made a conscious and deliberate effort to prepare and publicly set forth its position on the question of a new Senate for Canada.

II History of the Senate

A. Structure

In 1867 the Fathers of Confederation created a bicameral parliament, similar to most parliamentary democracies, consisting of an Upper House and a Lower House. The Upper House was called the Senate and the Lower House the House of Commons. The Fathers considered the Senate to be an essential ingredient of our democratic process.

At Confederation, three Senate divisions were created: Ontario, Quebec and the Maritime Provinces. Each of the divisions received 24 seats. When Prince Edward Island entered Confederation in 1873, it was assigned four seats from the Maritime Division. The creation of a fourth division in 1915 gave each of Manitoba, Alberta, Saskatchewan, and British Columbia six Senators. When Newfoundland joined Confederation in 1949, it was granted six seats. The Northwest Territories and the Yukon have one each.

B. Purposes

The Fathers of Confederation created the Senate with three purposes in mind, only one of which is now regarded as a serious enough basis for retaining the second chamber. One now outmoded purpose was to protect the propertied classes. John A. Macdonald, for example, stated that "the rights of the minority must be protected and the rich are always fewer in number than the poor," while George Etienne Cartier revealed the Senate's anti-democratic purpose when he declared that "in order that institutions may be stable and work harmoniously there must be a power of resistance to the democratic element." A $4,000 qualification for the office of Senator was therefore established. This qualification meant that a Senator's real and personal property had to be worth $4,000 over and above his debts and liabilities.

Another not unrelated purpose of the Senate was to provide a chamber "of sober second thought" on legislation coming from the House of Commons. A second House composed of men of experience, all appointed for life, appeared to offer valuable benefits for legislative review on both technical and substantive grounds. Indeed, although the founding fathers' expectations have not been fully realized in this respect, the Senate has from time to time provided Canada with valuable service of this kind.

The most important purpose of the Senate, however, was its role of protecting provincial interests in federal legislation. Indeed it appears unlikely that the Canadian union would have been launched at all without the provision of an Upper House where the interests of the less populated regions of Canada could be given some protection against the interests of the more populated provinces as expressed through the House of Commons. In a sense that is the essential bargain struck in any federal state: agreement to unite as a nation provided that local and regional interests will be protected against the sheer force of numbers. Donald Smiley has highlighted the issue nicely in his comments on the Senate at Confederation and today:

"The Senate. (a) At Confederation. The composition of the upper legislative chamber was the most contentious issue resolved by the Fathers of Confederation. Further, it seems that these men believed in the crucial importance of this body in the working of the new institutions. Peter Waite has said,

> *... most members of the Canadian Coalition government thought of federation largely in terms of the composition of the central legislature. In the lower house there would be "rep by pop"; in the upper house there would be representation by territory.... Of course local powers would be given to local bodies, but that was taken as a matter presenting little difficulty. The basis of the federal principle lay in the central legislature and in the balance between the House of Commons on the one hand and the Senate on the other.*

(b) Today. Whatever the usefulness of the contemporary Senate, it does not provide an effective outlet for interests which are localized."

C. Powers

The powers of the Senate have not much changed since the beginning of Confederation. Sections 17 to 55 of the Constitution give the Senate the same powers as the House of Commons except that it cannot introduce money bills. In addition, *The Constitution Act, 1982* removes the Senate's legal power to block constitutional amendments that have been passed by the House of Commons a second time. But apart from these differences, the Senate has substantially the same powers as the House of Commons. It is accepted by Senators on both sides of the Chamber, however, that the appointed nature of the Senate gives it very much a secondary role to the elected House of Commons. As a result, major amendments to or rejections of government bills have rarely occurred.

III Reasons for Reform

Under these circumstances the Senate, even while it may serve a useful role in legislative review and in research into various areas of public policy, cannot possibly accomplish its primary aim of protecting the interests of the Provinces in Parliament. In that respect, the Senate has failed miserably.

Two main reasons for the failure of the Senate to represent the interests of the provinces are:

- the regional basis of Senate composition
- the method of selection

Several distinguished commentators have frequently argued that the regional concept is neither an effective nor a sound basis for representing the diverse local interests of Canadians. J. E. Hodgetts defined a region as "an indentifiable area having sufficiently common interests that they can be articulated and aggregated and urged on the federal government as part of the demand inputs of our political system." He went on to argue that in Canada regions are not effective in articulating constituent interests to the Federal Government.

This difficulty is due to the unity of Canadian political parties which vote as party units and not as regional blocs. Donald Smiley, a prominent analyst of Canadian federalism, building on Hodgetts' arguments, concludes that "provinces rather than the regions are the effective units for aggregating, articulating and pressing those interests confined in an area less extensive than Canada as a whole."

Prince Edward Island is convinced that the regional division approach for Senate composition is ineffective. It is impractical as a vehicle for aggressively articulating local (provincial) interests in a Senate.

Senators are appointed by the Governor General of Canada on the recommendation of the Prime Minister. Generally, they are appointed not for their interest in/or ability to represent their provinces, as was the original purpose, but as a reward for services rendered to the government in power. The method of appointment ensures that the philosophy and voting pattern of Senators are consistent with those of the party in power. These patterns undermine public confidence in the second House. But even if these practices were reformed, an appointed chamber would always prove to be ineffective in challenging an elected body like the House of Commons.

IV Prince Edward Island's Model for a Reformed Senate

These problems with the Senate could not but have harmful effects on Canadian federalism. Without an effective Senate as a check on majoritarian pressures, the House of Commons can become dominated by parties with strong interests and representation from Central Canada, which may be insensitive to provincial or regional interests in the West or East of the country. This danger is most evident in the recent election of the national government in 1980 with virtually no representation from Western Canada. Yet this government embarked on major policy initiatives of overriding importance to Western Canada — the National Energy Program and the revision of the historic Crow's Nest Pass Agreement — without having to face up to any serious provincial or regional challenges from within the national Parliament itself. The Federal Government had the required majorities in the House Senate and used them to push through its program despite criticism from opposition parties which have often sought to protect provincial interests. Cabinet domination of the policy process makes the imposition of this kind of centralized decision-making even easier. The federal adoption of a user-pay policy with respect to transportation rates has also hurt the interests of Prince Edward Island and Eastern Canada generally — indeed almost all of the outlying areas of the country. This policy, too, touches on serious provincial and regional interests; yet these interests do not appear to be able to make their voices heard and respected in Ottawa.

It is precisely this kind of dilemma which a properly organized federal system seeks to avoid. In fact, the creation of a second chamber where the power of less-populated provinces can be effectively heard in national decision-making is critical to the federalist's sense of fair play. In the United States Senate, for example, the small state of Rhode Island (pop. 947,154) has an equal number of Senators to that of the larger states of New York (pop. 17,558,072) or California (pop. 23,667,565).

Similarly in Australia, the state governments have equal representation in the second chamber despite, for example, the wide population disparity between New South Wales (pop. 5,011,800) and Tasmania (pop. 413,700). This is the classic form of federalism where equal state representation is guaranteed in an Upper House or Senate of a national legislature. In this way a Senate can act as a balance to the House of Commons in the Parliament, thus articulating the interests of local jurisdictions in federal legislation.

Classic federalism seeks to achieve a difficult balancing act. On the one hand, it aims to protect local jurisdictions in the exercise of the powers conferred on them by the constitution and, on the other, to make national decision-making truly sensitive to the needs and interests of many different parts of the country. Unfortunately, as many scholars have noted, Canada's Constitution is not yet truly "federal" in character. Perhaps this is because some of our founding fathers, like John A. Macdonald, embraced federalism only after it had become clear that a union of the colonies was impossible on any other basis.

Such reluctant federalists struggled to make Canada's Constitution as legally centralized as possible. There is in our Constitution, for example, a legal power vested in the federal Cabinet to strike down or disallow provincial laws, as well as a power to take over any provincial property whenever the federal Parliament declares it to be "for the general advantage of Canada." Parliament can also override any provincial jurisdiction by exercising its general and/or emergency powers. These and other provisions create a legal imbalance in favour of the federal government.

It is therefore all the more important that ways be found to correct the deficiencies in the operation of the federal Parliament so that these awesome powers are exercised wisely and responsibly. A reformed Senate, constructed according to the principles of classical federalism, is absolutely vital to this task.

A. Features

Prince Edward Island argues for a Senate model which incorporates the following principles:

1. *that provincial rather than regional divisions be the basis for Senate composition;*
2. *that equality between provinces be the basis for Senate composition;*
3. *that Senators have a ten-year term with regular rotations every five years;*
4. *that Senators be elected;*
5. *that there be ten Senators for each province;*
6. *that the Senate have a full legislative role.*

1. & 2. Representation by Province and the Equality Principle

In the classic definition of federalism, all of the state governments should have equal representation in the Upper House of a bicameral parliament. Such is not the case in the Canadian Parliament. There is only a commitment to equal *regional* representation. (Since the admission of Newfoundland to Canada in 1949, even this principle has been upset; the Atlantic region now enjoys a higher number of seats in the Senate than any other region.) But Canada is not formally a nation of regions. There are no elected governments at the regional level. The regional system does not and cannot accommodate the concerns of individual provinces. On the contrary, this is a nation where the provinces are the legal and political foundation for expressing local concerns.

Recent reports on Senate reform such as that by the Alberta Government (1982); Goldenberg-Lamontagne (1980); Pepin-Robarts (1979); Ontario Advisory Committee (1978); Bill C-60 (1978); and the Joint Committee (1978) do not support the principle of the equality of provinces. The Canada West Foundation Report (1981) does support the "equality-of-provinces principle" for appointments to the Senate. In a true parliamentary federation, the "equality-of-provinces principle" would be implemented. This is the practice in Australia and the United States.

The equality principle supports the theory of a parliamentary federation with the Senate as a "House of the Provinces" with each province seen as an equal partner in the federation regardless of its size. If equality by provinces, rather than by regions, is accepted in an

elected second Chamber, the Senate would reflect its classic role as an Upper House in a democratic federation.

It would help establish the provinces as the foundation stones of the Senate. It would give smaller provinces — which can otherwise be swallowed up by the sheer power of larger provinces — a greater voice in protecting their interests in the parliamentary federation.

A concern raised by larger provinces respecting the equality principle is that it would give a strength and voice to smaller provinces in the Senate out of all proportion to their numbers or importance. It is difficult to accept either the logic or the justice of this proposition. The interests of the larger, more populated provinces are already well protected by the rule of representation by population in the House of Commons. To ask for population to be factored in again in the second chamber would be to compound the dominance of sheer numbers in Parliament. Classical federalists have for that reason always insisted that the representative principle in the two houses of a federal Parliament should be fundamentally different. We continue to regard that distinction as a sound one.

Furthermore, real power in a parliamentary democracy is always centered around the "democratic" and "executive ministerial" principles. These would afford the House of Commons predominance and control of day-to-day government functions. The Commons would also be the place where the fate of a government would be determined; without the support of the House of Commons, no government can continue to govern. The Commons through the Ministers would also have access to and control over the bureaucracy which is so vital a part of the entire legislative process. There would appear to be little or no evidence to suggest that granting equality of representation in the Senate would upset the predominant power of the House of Commons or in any serious way overpower the interests of the larger provinces. Equality is at best then a *defensive* gesture, an admission of the need to protect the federation's weaker members from domination by the stronger.

3. Term of Office

If the Senate is to act as an Upper House in a bicameral parliament with full legislative responsibilities, then the term of office should be sufficient to accommodate the purpose. Prince Edward Island would suggest a term of ten years, with half of each province's seats replaced every five years. This would allow for continuity and discipline in legislative review during abrupt government changes. In addition to the ten-year term, Prince Edward Island recommends that election dates be independent of either federal or provincial elections.

4. Selection of Senators

When Senate reform is debated, methods of Senatorial selection are usually considered. The popular methods are:

(i) appointment by the central government — the present situation;

(ii) appointment by the provinces;

(iii) appointment by both the central government and the provinces;

(iv) direct election by the people.

Prince Edward Island argues that Senators must have the moral fortitude to represent forcefully the interests of their provinces in an Upper House. The best method of selection to encourage Senators to make the Senate a more useful Chamber is by election.

If Senate representatives were elected in the same way as the members of the House of Commons, then they would tend to be more aggressive in representing their respective provinces. Also there would be a tendency for both chambers to be careful about infringing upon the other's jurisdictional territory. The provinces would have legitimate power and input into national legislative issues of concern to them.

If the Senate were able therefore to defend provincial interests effectively from *within* the federal Parliament itself, there would be far less need for acrimony and confrontation between provincial and federal governments in Canada. The provinces would not have to shoulder the whole burden of defending provincial interests, nor would the First Ministers' Conference be the exclusive forum for the settling of federal-provincial disputes. The result should be considerably less strife in the nation.

5. Number of Senators

While Prince Edward Island is firm on the equality-by-provinces principle for representation, it is flexible on the number of Senators per province. The Senate must have sufficient numbers to provide a suitable forum to represent its constituents. When establishing the number of Senatorial positions, it must also be remembered that much of a Senator's business (i.e. serving on committees, speaking engagements) will be conducted outside the Senate Chambers. If some of these activities are to go on while routine Senate debates are also proceeding, there will certainly be a need for a respectable number of Senate seats.

Prince Edward Island recommends that each province be assigned ten Senatorial positions (Table 1). It further recommends that the Northwest Territories and the Yukon be assigned one Senatorial position each. Should either the Northwest Territories or the Yukon gain provincial status, the equality principle would apply; they would then be assigned ten Senatorial positions. Under the Prince Edward Island model, Canada would have one hundred and two (102) Senators.

6. Jurisdiction

The Constitution Act, 1982 gives the Senate substantially the same legislative powers as the House of Commons. However, the Senate is not empowered to introduce money bills.

Prince Edward Island argues that the original concept of the Senate having equal powers (except for introducing money bills) with the House of Commons was legitimate. It recommends maintenance of present powers of the Senate and the House of Commons. If an elected Senate is truly to represent provincial interests, then it must have the necessary strength to do so.

Some commentators are concerned about the possibility of the Senate and the House of Commons reaching an impasse on some issues. This does not disturb the Province of Prince Edward Island. There would be little point in the idea of having a second chamber if deadlocks between the Houses did not occur occasionally.

TABLE I
Proposals for Distribution of Senatorial Positions

	Present Senate	Joint Committee (1972)	Bill C-60 (1978)	Ontario Advisory Committee (1978)	Pepin-Robarts (1979)	Goldenberg-Lamontagne (1980)	Canada West Foundation (1981)	Alberta Government (1982)	P.E.I. (1983)
Newfoundland	6	6	8	2	4	8	6-10	4	10
Nova Scotia	10	10	10	2	4	10	6-10	4	10
New Brunswick	10	10	10	2	4	10	6-10	4	10
Prince Edward Island	4	4	4	1	2	4	6-10	2	10
Quebec	24	24	24	6	12	24	6-10	10	10
Ontario	24	24	24	6	12	24	6-10	10	10
Manitoba	6	12	8	2	4	10	6-10	6	10
Saskatchewan	6	12	8	2	4	10	6-10	4	10
Alberta	6	12	10	3	6	12	6-10	8	10
British Columbia	6	12	10	4	8	12	6-10	8	10
Territories	2	4	2	0	0	2	1 or 2 each	0	2
TOTAL	**104**	**130**	**118**	30	**60**	**126**	**62-104**	**60**	**102**

The possible threat of a Senate challenge to the House of Commons would, however, probably make the House consider provincial and regional interests more carefully than at present, adjust their programs accordingly, and thus actually reduce the likelihood of deadlocks. But if problems do occur, this province is convinced that when the Houses in a bicameral, federal system willingly accept the possibility of deadlocks, they demonstrate the value and commitment which a country places on federalism. Federalism is, after all, designed to protect one level of government from unreasonable interference by the actions of another. That value cannot be achieved without accepting the price of occasional disputes between the two great Houses of a federal state.

As indicated earlier, Prince Edward Island wishes to see the Senate with substantial powers. Only in that way can the values of federalism be strengthened. The proposed use of a suspensive veto which would merely give the Senate power to delay rather than to block objectionable legislation from the Commons, would certainly weaken the Senate. The length of time during which a veto would continue, however, would crucially affect its usefulness. Prince Edward Island is also aware of the argument that a future Senate might be more inclined to use a suspensive veto against objectionable legislation from the House of Commons than the absolute legal veto which it now enjoys. These arguments notwithstanding, the province continues to support a Senate with full legal powers and looks forward to a vigorous exchange of views with other Governments on the matter.

Conclusion

The need for better federal-provincial relations has been apparent for well over a decade. A reformed Senate with equal representation of the provinces would ensure that provincial rights and interests would not be so readily overlooked in federal legislation and policy. Such a result would contribute to increased governmental co-operation and productivity.

Prince Edward Island urges that Senate reform, built on the principle of equality of provinces, be implemented as quickly as possible.

COMMENTS

BY

HONOURABLE JAMES M. LEE

ON

THE SENATE IN A FEDERAL SYSTEM

THE POSITION OF

THE PROVINCE OF PRINCE EDWARD ISLAND

NOT FOR RELEASE BEFORE
TUESDAY, DECEMBER 20, 1983

AFTER PARTICIPATING IN THE FIRST STAGE OF NEGOTIATIONS LEADING TO A CONSTITUTIONAL SETTLEMENT IN 1982, THE PROVINCE IS PLEASED TO PRESENT ITS POSITION ON THE SENATE IN A FEDERAL SYSTEM.

PRINCE EDWARD ISLAND ARGUES FOR A SENATE MODEL WHICH INCORPORATES THE FOLLOWING PRINCIPLES:

1. THAT PROVINCIAL RATHER THAN REGIONAL DIVISIONS BE THE BASIS FOR SENATE COMPOSITION;
2. THAT EQUALITY BETWEEN PROVINCES BE THE BASIS FOR SENATE COMPOSITION;
3. THAT SENATORS HAVE A TEN-YEAR TERM WITH REGULAR ROTATIONS EVERY FIVE YEARS;
4. THAT SENATORS BE ELECTED;
5. THAT THERE BE TEN SENATORS FOR EACH PROVINCE;
6. THAT THE SENATE CONTINUE TO HAVE ITS PRESENT LEGISLATIVE RESPONSIBILITIES.

THE EQUALITY PRINCIPLE SUPPORTS THE THEORY OF A PARLIAMENTARY FEDERATION WITH THE SENATE AS A "HOUSE OF PROVINCES" WITH EACH PROVINCE SEEN AS AN EQUAL PARTNER IN THE FEDERATION REGARDLESS OF ITS SIZE. IF EQUALITY BY PROVINCES, RATHER THAN BY REGIONS, IS ACCEPTED IN AN ELECTED SECOND CHAMBER, THE SENATE WOULD REFLECT ITS CLASSIC ROLE AS AN UPPER HOUSE IN A DEMOCRATIC FEDERATION.

THE NEED FOR BETTER FEDERAL-PROVINCIAL RELATIONS HAS BEEN APPARENT FOR WELL OVER A DECADE. A REFORMED SENATE WITH EQUAL REPRESENTATION OF THE PROVINCES WOULD ENSURE THAT PROVINCIAL RIGHTS AND INTERESTS WOULD NOT BE SO READILY OVERLOOKED IN FEDERAL LEGISLATION AND POLICY. SUCH A RESULT WOULD CONTRIBUTE TO INCREASED GOVERNMENTAL COOPERATION AND PRODUCTIVITY.

PRINCE EDWARD ISLAND URGES THAT SENATE REFORM, BUILT ON THE PRINCIPLE OF EQUALITY OF PROVINCES, BE IMPLEMENTED AS QUICKLY AS POSSIBLE.

POOR

QUALITY

ORIGINAL